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No. 11 Original

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN EQUITY

OCTOBER TERM, 1930.

THE STATE OF WASHINGTON,
Complainant,

v.

THE STATE OF OREGON, *Defendant.*

MOTION TO STRIKE AFFIRMATIVE DEFENSES

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No. 17 Original

IN THE

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UNITED STATES

IN EQUITY

OCTOBER TERM, 1930.

THE STATE OF WASHINGTON,
Complainant,

v.

THE STATE OF OREGON, *Defendant.*

NOTICE.

To the State of Oregon, Defendant above named, and to Isaac H. Van Winkle, James A. Fee, Charles Z. Randall, and George T. Cochran, Attorneys for said Defendant:

You will please be advised that on Monday the 21st of March, 1932, the complainant will submit to the consideration of the court its motion to strike, a copy of which is attached.

JOHN H. DUNBAR,
Attorney General,

JOHN C. HURSPOOL,
Assistant Attorney General,

FRED J. CUNNINGHAM,
Attorneys for Complainant.

Dated February 17, 1932.

No. 17 Original

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN EQUITY

OCTOBER TERM, 1930.

THE STATE OF WASHINGTON,
Complainant,

v.

THE STATE OF OREGON, *Defendant.*

MOTION TO STRIKE AFFIRMATIVE DEFENSES

Comes now the complainant above named and moves the court to strike out each of the following affirmative defenses to the original bill of complaint, contained in the printed answer of the defendant, to-wit:

Complainant moves to strike that portion at page 23, reading as follows:

"This defendant by way of further defense to plaintiff's bill of complaint herein alleges that the greater part of the rights to the use of the waters of said Walla Walla river and its tributaries were ad-

judicated and determined more than 20 years ago by the courts of the said state of Oregon and said appropriators whose rights and interests therein were so determined have ever since held and still hold the waters of said streams pursuant to the provisions of said decree, and said rights are valuable property rights that have become vested in the individual appropriators and their successors under the constitution and laws of the state of Oregon and of the United States, and plaintiff's bill of complaint is an attempt to deprive the owners thereof of their property rights therein, but neither the state of Oregon nor the United States are entitled to divest such owners of such property rights without due process of law."

Complainant moves to strike that portion at page 25, reading as follows:

"This defendant, the State of Oregon, for a further defense to plaintiff's Bill of Complaint on file herein alleges that said state of Oregon and its people diverted, appropriated and used, in good faith, under a claim of right and color of title, pursuant to the laws of the state of Oregon, and the recognized custom of appropriating water from said streams in said territory, at said time, and applied to beneficial uses from about the year 1864 to 1893, water from said river and its tributaries for the irrigation of 5,831 acres of land and about 4,000 miners' inches measured under a 6-inch pressure for power purposes and have ever since held and used said waters for said purposes, and from 1892 to 1909 6,712.73 acres and from 1908 to 1921 3,042.82, and from 1920 to 1927 1,573.98, and said appropriators have taken, used, held, and carried away the said waters of said stream openly, notoriously, and adversely to the state of Washington, its citizens and all the world since said dates hereinbefore alleged."

Complainant moves to strike that portion at page 26, reading as follows:

"That during the times hereinbefore mentioned the said state of Oregon and its people have built dams, head-gates, main and lateral ditches, leveled and cultivated said lands, planted orchards, vineyards, pastures, lawns, meadows, alfalfa fields, ornamental and shade trees, and built and established homes upon the said lands, and constructed roads and highways thereto and therefrom, and expended enormous sums of money in doing the said work and making the said improvements, and during all of said times the said state of Washington and its people had notice and actual knowledge of said development, improvements, and expenditure of time, labor and money, and neither the said state of Washington nor its people have ever protested against the diversion, appropriation or use of the waters of said streams for the purposes hereinbefore enumerated, and by reason of the acts, conduct, and doings of the said state of Washington, its agents, servants, people and corporations, it and they are and ought to be estopped from claiming or asserting that the state of Oregon or its people are or have been damaging them or any of them, or inflicting any wrong or injury upon them, or any of them, and estopped from asserting or claiming any right or interest in or to the waters of said stream so appropriated or used, and it and they ought to be estopped from interfering with the said appropriations or diversions from said streams or any of them."

Complainant moves to strike that portion at page 27, reading as follows:

"That the states of Oregon and Washington both recognize by their statutes and the decisions of their highest courts the same principles of law as to adverse possession, laches and estoppel and the

limitation of time within which real property may be recovered."

Said motions are made for the reason that each and all of said affirmative defenses and each and all of the allegations and conclusions therein contained are incompetent, irrelevant and immaterial to any issue in said cause and are legally insufficient to constitute a defense to said bill of complaint, and complainant prays that each and all of said defenses as above set forth be stricken out and taken for naught, and that, upon determination of this motion by the court, the complainant be given a reasonable time in which to file its reply to the answer of the defendant.

JOHN H. DUNBAR,
Attorney General,

JOHN C. HURSPOOL,
Assistant Attorney General,

FRED J. CUNNINGHAM,
Attorneys for Complainant.

GENERAL STATEMENT.

The motions to strike are in the nature of demurrers to each of said defenses on the ground that each is not sufficient as a matter of law to constitute a defense to the original bill of the complainant. For the purpose of determining the legal sufficiency of each of these defenses as challenged in the motions, all properly pleaded facts in the answer may be assumed to be true.

The state of Washington has submitted herein its original bill against the state of Oregon stating in substance, among other things, that the state of Oregon through its state engineer has authorized and is authorizing a wrongful encroachment by landowners with junior rights in the state of Oregon upon senior rights of the state of Washington and its citizens in and to the waters of the Walla Walla river, an interstate stream rising in the state of Oregon and flowing into and through a part of the state of Washington, so that the prior appropriators from said stream in the state of Washington have been and are being deprived of sufficient water properly to irrigate their lands, asking that the rights of the state of Oregon be determined, offering to do equity in the premises and praying that the state of Oregon and its officers and citizens be enjoined from such wrongful acts and for general relief. (Bill pp. 9-14.)

The state of Oregon in its answer, after denying generally the principal allegations of the bill as to the

charge of wrongdoing, sets up three affirmative defenses to which the complainant objects in the motions involved herein.

VESTED RIGHTS.

The first of these defenses alleges among other things (Answer p. 23) that the greater part of the rights to the use of the water of the Walla Walla river in the state of Oregon have become vested in the individual appropriators and that the plaintiff's bill of complaint is an attempt to deprive the owners of their property rights which cannot be done without due process of law.

ADVERSE USE.

The second of these affirmative defenses alleges in substance (Answer p. 25-26) that the state of Oregon and its people have diverted, appropriated and used in good faith, under a claim of right and color of title, pursuant to the laws of the state of Oregon from the year 1864 certain amounts of water in the answer specified, and ever since have held and used said water openly, notoriously and adversely to the state of Washington, its citizens and all the world.

ESTOPPEL.

The third of these affirmative defenses alleges in substance that during the period above specified the state of Oregon and its people have built homes upon the lands irrigated from the river and have expended enormous sums of money in making improvements;

that during all this period the state of Washington and its people had notice and actual knowledge of these improvements and of the expenditure of time, labor and money and that neither the state of Washington nor its people have ever protested against said diversion, appropriation or use of the waters of said stream; that by reason of the acts, conduct and doings of the state of Washington, its people and corporations, it and they are and ought to be estopped from claiming or asserting that the state of Oregon or its people are or have been damaging them or inflicting any wrong or injury upon them and estopped from asserting or claiming any right or interest in the waters so appropriated or used and it and they ought to be estopped from interfering with said appropriations or diversions.

The motions will be discussed in the order stated.

It is thought that a determination of the rules of law applicable to each of the three affirmative defenses herein moved against will greatly clarify the scope and nature of the evidence required of the parties to this cause in support of their respective claims.

ARGUMENT.

I.

Vested Rights.

The allegation of the defendant's answer that owners of property cannot be deprived of vested rights without due process of law is correct as an abstract statement, but has no bearing on the present suit. This suit was brought for the express purpose of determining the rights to the waters of the Walla Walla river. How can a claim of vested rights be a defense to such a suit?

An interstate stream is a heritage common to all the states through which it flows. Such a stream cannot be treated for the purpose of determining the relative rights of the states through which it flows as a system of independent segments according to its course in each state, but as a whole. The rights of the several states interested in such a stream are correlative.

Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956;

Wyoming v. Colorado, 259 U. S. 419, 66 L. Ed. 999;

New Jersey v. New York, U. S. Sup. Ct., Adv. Op. 1930-31, No. 14, p. 648;

Connecticut v. Massachusetts, U. S. Sup. Ct., Adv. Op. 1930-31, No. 9, p. 297.

The laws and courts, therefore, of one state cannot confer on itself or its citizens, as vested rights, rights which do not belong to it but belong to another sovereign state.

In the cases of *Kansas v. Colorado,* 206 U. S. 46, *supra, New Jersey v. New York, supra,* and *Connecticut v. Massachusetts, supra,* the common law rights of riparian owners to have a stream flow undiminished in volume which would be a vested right was relied on and in each case this court refused to recognize such right as between the states.

In the case of *New Jersey v. New York, supra,* Justice Holmes, speaking for the court in denying this claim said:

"We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single state. *Connecticut v. Massachusetts,* February 24, 1931 (— U. S. —, ante, 297, 51 S. Ct. 286). Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas.

See *Missouri v. Illinois,* 200 U. S. 496, 520, 50 L. ed. 572, 578, 26 S. Ct. 268; *Kansas v. Colorado,* 206 U. S. 46, 98, 117, 51 L. ed. 956, 975, 983, 27 S. Ct. 655; *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 237, 51 L. ed. 1038, 1044, 27 S. Ct. 618, 11 Ann. Cas. 488; *Wyoming v. Colorado,* 259 U. S. 419, 465, 470, 66 L. ed. 999, 1013, 1015, 42 S. Ct. 552; *Connecticut v. Massachusetts,* February 24, 1931 (— U. S. —, ante, 297, 51 S. Ct. 286)."

The inhabitants of one state have no vested rights which can be set up as a basis for preventing the supreme court of the United States from determining the respective rights between two states.

See also, *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 237, 51 L. ed. 1038, 1044.

II.

Adverse Use.

The defendant by its allegation on page 25 of its answer, heretofore quoted, alleges that it has rights by adverse use as against the state of Washington.

It is elementary that adverse use or the statute of limitations does not run against a state, the ancient maxim being, *"Nullum Tempus Occurrit regi."*

36 Cyc. 910;
37 C. J. 710;
Iowa v. Carr, (C. C. A.) 191 Fed. 257.

In the case of *Missouri v. Illinois,* 200 U. S. 496, 519, 50 L. ed. 572, 578, Justice Holmes observes, with respect to the question of prescription as applied to a public nuisance, as follows:

"The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent state. Oppenheim Int. Law, 293, Secs. 242, 243. It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long. *Davis v. Mills,* 194 U. S. 451, 457. Yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitation, the duration of patents, the age of majority, etc., is to depend upon the law making body." (Italics ours.)

Waters running in a natural stream belong to the public. The modern expression is that such waters are owned by the state in trust for the people.

Murphy v. Kerr, 296 Fed. 536, 540;
Marks v. Hilger, 262 Fed. 302, 304;
Pulaski Irr. Ditch Co. v. Trinidad, 70 Colo. 565, 203 P. 681, 682;
Coulson v. Aberdeen S. C., 39 Ida. 320, 227 P. 29.

In the instant case the state of Washington is therefore claiming an interest in the waters of the Walla Walla river in its sovereign capacity as a state of the Union. As well stated by Justice Holmes in the case of *Georgia v. Tennessee Copper Co.,* 206 U. S. 230, 237, *supra*:

"This is a suit by the state for an injury to it in its capacity of quasi sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

See also, *North Dakota v. Minnesota,* 263 U. S. 365, 373, 68 L. ed. 342, 345.

Manifestly the laws of the state of Washington have no extraterritorial effect in the state of Oregon and vice versa, and state statutes of limitations have no application.

It is alleged on page 27 of the defendant's printed answer that the states of Oregon and Washington both recognize by their statutes and the decisions of their highest courts the same principles of law as to adverse possession, laches and estoppel and the limitation of time within which real property may be recovered.

It should be remembered, however, that there is no law in the state of Washington recognizing rights in water by adverse use as against the state.

Even under the facts disclosed by the allegations of the complainant's bill and the defendant's answer thereto, the strict doctrine of private adverse use is inapplicable to the instant case.

It is agreed by both parties to the instant suit that the quantity of the waters of the Walla Walla river during the last 8 or 10 years has been decreasing owing to the increasing deficiency of rainfall and snow.

On page 7 of the complainant's printed bill it is alleged as follows:

"The flow thereof (Walla Walla river) during the past eight or ten years has been decreasing owing to an increasing deficiency of rain and snowfall dur-

ing said time until recently and the flow does not exceed two-thirds the normal flow."

The answer of the defendant to this allegation is shown on page 7 of the defendant's printed answer and is as follows:

"Defendant admits that the flow thereof (Walla Walla river) during the past 8 or 10 years has been decreasing owing to the increasing deficiency of rainfall and snow during said time until recently, but defendant denies the flow does not exceed two-thirds the normal flow, or that said flow amounts to two-thirds of the normal flow and alleges that in late July and August the same amounts to about 80 cubic feet per second of time."

It is also conceded by both parties to the instant action that there has been a gradual increase of the use of the waters of the Walla Walla river by the citizens of both states involved in this controversy, at least since the year 1870. (Complainant's Bill, page 8, Defendant's Answer, page 9.)

While the number of users of water of the stream is not specifically alleged, the reasonable inference to be drawn from the pleadings is that the number of persons involved in the use of the water of said stream is great.

We then have a situation in the instant case where the uses of the water of the stream in question have gradually increased from year to year and the natural supply of the stream has diminished from year to year, and where the number of water users is large and located in each of the states concerned.

Some of the elements necessary to be proved to sustain rights by adverse use are lacking in such a situation. Rights by adverse use are individual. A court of equity does not recognize group rights by adverse use. They cannot be acquired wholesale. One, or more, of the elements of hostility, notoriety, uninterruption and exclusiveness, is always lacking in a general use of water by numerous persons in ever varying extent, and during constantly changing periods of time.

Judge Whitson in the case of *Morris v. Bean,* 146 Fed. 423, describes the difficulties involved in the application of the rule of adverse use as between private parties in the following language (page 433):

"The statute of limitations is applied by analogy in courts of equity to that relating to the possession of real estate. It never runs upon a scrambling possession. It presupposes adverse, exclusive, and uninterrupted possession under a claim of right. The claim must be hostile to that of the person against whom it is asserted. The aid of the statute has occasionally been invoked with success in cases of this character, but not under conditions similar to those of this case.

"The defendants made their first diversions of water in 1893. A few of them have brought themselves barely within the statutory period. It often happens that persons who are takers of water from a stream gradually enlarge their diversions until they begin to deprive the first appropriators of the amount to which they are entitled. The taking is so gradual, and the enlargement of the use so imperceptible, that it is impossible to fix a time when it begins to be adverse. This is not an unusual situation, and it is presented by the testimony here. The

quantity of water in this stream varies greatly from spring floods to low water in the fall. Most small streams are subject to this variation. The flow of water varies also with the seasons, depending largely upon the amount of snowfall or rain in the mountains. It is manifestly impracticable to apply the statute of limitations to such a state of affairs, and in this case particularly it could not apply, because the defendants have not had the uninterrupted use of the water for the statutory period. It is shown that they at times turned the water down, upon demand of the complainant. They have gradually increased their diversions, and just at what point they encroached upon the rights of the complainant and the intervener cannot be determined from the testimony, and just how long it has continued cannot be ascertained; but it is clear that they did not do so to any considerable extent until after the year 1893, and this suit was brought in 1903. As to real estate the possession is easily discovered. It is susceptible of actual proof, but here it is not shown that either the complainant or intervener were ever entirely deprived of water. During the flood time water always reached them. They had the use of it for a time, some years longer than others. Who can divine with definiteness just what amount of water the defendants used to the exclusion of the complainant or intervener, or how long it was used to their exclusion each year? The burden is upon the defendants to bring themselves within the statute, and the proof must be clear before a prescriptive right will be enforced. The claim cannot prevail under the conditions disclosed. *Last Chance Ditch Co. v. Heilbron,* (Cal.) 26 Pac. 523; *Fogarty v. Fogarty,* (Cal.) 61 Pac. 570; *Boyce v. Capper,* (Or.) 61 Pac. 642; *Huston et al. v. Bybee,* (Or.) 20 Pac. 51; Long on Irrigation, Secs. 90-91-92."

This decision was affirmed on appeal to the United States Supreme Court.

Bean v. Morris, 221 U. S. 485, 55 L. ed. 821.

It is submitted, therefore, that the doctrine of adverse use has no application to a suit between quasi sovereign states; that in any event it has no application to the situation involved in the instant case, and that the defense based thereon and set up in the defendant's answer to the bill of the complainant is legally insufficient to constitute a defense to said bill.

III.

Estoppel.

The third allegation (p. 26 of the answer) attacked by complainant's motion attempts to set up an estoppel as a defense.

Again we have that universal rule that "estoppel and laches do not operate against a state and no procrastination of public officials prejudices the state and their tardiness neither bars nor defeats the state from vindicating its sovereign rights except where positive statute so provide."

State ex rel. Veale v. Paul, 113 Kans. 289, 214 P. 425.

See also:

Iowa v. Carr, 191 Fed. 257, 266;
State v. Hutchins, 79 N. H. 132, 105 Atl. 519;
People v. Brown, 67 Ill. 435, 438.

In the case last cited the rule is stated in the following language:

"It is a familiar doctrine, that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall

within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

"The doctrine is well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from *laches,* and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials."

Under the rule above stated, the state's rights in public waters cannot be conveyed or impaired by an estoppel growing out of mere failure to object to encroachments.

That the state is acting in its sovereign capacity in bringing this suit has already been shown in the discussion under the head of "Adverse Use" and need not be restated.

Moreover, even as between private persons, the answer fails to show an estoppel. Inaction, which is the only ground shown, is never of itself sufficient to create an estoppel.

21 C. J., Estoppel, sec. 154, p. 1150.

The answer to this contention is well stated in the case of *Morris v. Bean, supra,* 146 Fed. 423, 433, as follows:

"It is safe to say that few cases of this character have been tried where the defense of estoppel has

not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew that the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other."

Affirmed *Bean v. Morris,* 221 U. S. 485, 55 L. ed. 821.

See also:

Holbrook Irr. Dist. v. Arkansas Val. S. B. & I. L. Co., 42 Fed. (2d) 541, 546.

CONCLUSION.

The three affirmative defenses attacked in this motion tend to confuse the real issues in the controversy. If not stricken, evidence would be offered and the question of its exclusion would then come before the master or the court, but, even if excluded, the cost of securing and producing the witnesses would have to be borne, so that complainant deemed it the better practice to present these questions by a motion to strike, believing them to be well taken.

Respectfully submitted,

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